U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

DATE: SEP 0 4 2013 OFFICE: NEBRASKA SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Rachel Nimmo
For

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, revoked approval of the immigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner describes itself as an IT consulting services business. It seeks to permanently employ the beneficiary in the United States as a senior software engineer. On the Form I-140, Immigrant Petition for Alien Worker, the petitioner requested classification of the beneficiary as an advanced degree professional pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2).

As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the U.S. Department of Labor (DOL).

The director's decision revoking the approved petition concluded that the petition cannot be approved because the labor certification does not require a member of the professions holding an advanced degree.

On appeal, counsel cites 20 C.F.R § 656.17(h)(4)(i) to assert that an employer may have alternative requirements for the job opportunity listed in the ETA Form 9089 provided they are "substantially equivalent" to the primary requirements. Counsel asserts that in the instant case ETA Form 9089 Section H-14 states that "a combination of education towards a Bachelors or its equivalent as determined by a qualified evaluation service" is acceptable for the job opportunity. Counsel contends that the director erroneously determined that since there is an alternative *education* requirement, less than the primary *employment* requirement is acceptable. Counsel states that 60 months of post-bachelor's experience is required for the proffered position, "regardless of whether the applicants possess the required bachelor's degree or satisfy the alternative education equivalent through applicable combination of education." Counsel cites *Matter of Gen. Electric Co. (GE Healthcare)*, 2011-PER-02696 (BALCA Jan. 22, 2013), for the proposition that an alternative education requirement "does not render the alternative requirement for the position less than the Primary requirements for the position." Counsel states that in the instant case, the alternative education requirement of a combination of education toward a bachelor's degree and 60 months of experience is substantially equivalent to the primary education and experience requirements.

The appeal is properly filed and makes a specific allegation of error in law or fact. The AAO conducts appellate review on a *de novo* basis.[1] The AAO considers all pertinent evidence in the

[1] *See* 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g., Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

record, including new evidence properly submitted upon appeal.[2] A petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the director does not identify all of the grounds for denial in the initial decision.[3]

The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

Section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or aliens of exceptional ability, whose services are sought by an employer in the United States. *See also* 8 C.F.R. § 204.5(k)(1).

The regulation at 8 C.F.R. § 204.5(k)(2) defines the terms "advanced degree" and "profession." An "advanced degree" is defined as:

> [A]ny United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree

A "profession" is defined as "one of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation." The occupations listed at section 101(a)(32) of the Act are "architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries."

The regulation at 8 C.F.R. § 204.5(k)(3)(i) states that a petition for an advanced degree professional must be accompanied by:

> (A) An official academic record showing that the alien has an United States advanced degree or a foreign equivalent degree; or
>
> (B) An official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of

---

[2] The submission of additional evidence on appeal is allowed by the instructions to Form I-290B, Notice of Appeal or Motion, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

[3] *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003).

> letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty.

In addition, the regulation at 8 C.F.R. § 204.5(k)(4)(i) states, in part:

> The job offer portion of the individual labor certification, Schedule A application, or Pilot Program application must demonstrate that the job requires a professional holding an advanced degree or the equivalent or an alien of exceptional ability.

In summary, a petition for an advanced degree professional must establish that the beneficiary is a member of the professions holding an advanced degree, and that the offered position requires, at a minimum, a professional holding an advanced degree. Specifically, for the offered position, the petitioner must establish that the labor certification requires no less than a U.S. academic or professional degree (or a foreign equivalent degree) above a baccalaureate, *or* a U.S. baccalaureate (or a foreign equivalent degree) followed by at least five years of progressive experience in the specialty.

In the instant case, Part H of the labor certification submitted with the petition states that the offered position has the following minimum requirements:

H.4. Education: bachelor's degree in computer science, computer information systems, or engineering.
H.5. Training: None required.
H.6. Experience in the job offered: 60 months.
H.7. Alternate field of study: management information systems, information technology, or any related field.
H.8. Alternate combination of education and experience: None accepted.
H.9. Foreign educational equivalent: Accepted.
H.10. Experience in an alternate occupation: 60 months.
H.14. Specific skills or other requirements: Required travel and relocation to various client sites throughout the USA. Any suitable combination of education, training or experience is acceptable. ***For H-9, We will accept a combination of education towards a Bachelors [sic] or its equivalent as determined by a qualified evaluation service.

Counsel states that the alternative education requirement of a combination of education toward a bachelor's degree or its equivalent as determined by a "qualified evaluation service" and 60 months of experience is substantially equivalent to the primary education and experience requirements. It is noted that there is no evidence in the record as to what constitutes a "qualified evaluation service." Since an individual could qualify for the job opportunity through an evaluation service that would accept a combination of education that is less than a degree above a baccalaureate, or a baccalaureate followed by five years of progressive experience in the specialty, the petition does not qualify for advanced degree professional classification.

Counsel cites *Matter of Gen. Electric Co. (GE Healthcare)*, 2011-PER-02696 (BALCA Jan. 22, 2013), to assert that an alternative education requirement will not transform the alternative requirement for the job opportunity into something less than the primary experience and education requirements. At issue in that case is the experience requirement from Box H-10-A and whether it must be rewritten in H-8-C. *GE Healthcare* does not specifically address Section H-14 and an alternative education requirement.

There is no provision in statute or regulation that compels U.S. Citizenship and Immigration Services (USCIS) to readjudicate a petition under a different preference classification once the director has rendered a decision. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1988).

In summary, the offered position does not require an advanced degree. Therefore, the petition cannot be approved for a member of the professions holding an advanced degree under section 203(b)(2) of the Act. The director's decision revoking approval of the petition is affirmed.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.